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Supreme Court, U.S.
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No. _____

In The

Supreme Court of The United States

WANDA BAKER an Individual, and SCOTT ZALEWSKI, an Individual, on behalf of themselves and all others similarly situated,

Petitioners,

v.

SUNNY CHEVROLET INC., a Michigan Corporation, d/b/a WAYLAND CHEVROLET,

Respondent.

Petition for a Writ of Certiorari
To The United States Court of
Appeals for the Sixth Circuit

ON PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does the correction of error provision of the Truth In Lending Act, 15 U.S.C. §1640(b), apply to non-computational errors?

Are statutory damages recoverable under the Truth In Lending Act, 15 U.S.C. §1640(a) for violations of §1638(b)(1) of the Act?

PARTIES

Wanda Baker and Scott Zalewski are individuals who purchased and attempted to finance a vehicle through Sunny Chevrolet.

Sunny Chevrolet Inc. is a Michigan automobile dealership which does business as Wayland Chevrolet, and sells both new and used vehicles.

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CITATIONS OF REPORTS OF OPINIONS AND ORDERS

The District Court's two opinions were not reported, nor was the Appellate Court's denial of rehearing en banc. The Appellate Court's opinion affirming the District Court's ruling was reported at 349 F.3d 862 (6th Cir. 2003). All four opinions are reprinted in the Appendix.

BASIS FOR JURISDICTION

This petition seeks review of a judgment of the United States Court of Appeals for the Sixth Circuit entered November 4, 2003. A petition for rehearing *en banc* was denied on December 29, 2003. This petition is timely filed within 90 days of that date as provided by Rule 13(3). Jurisdiction of this Court is founded on 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory provisions involved in this case, 15 U.S.C. §§1601(a), 1638(a), 1638(b)(1), 1640(a), 1640(b), and Regulation Z, 12 C.F.R. § 226.17, are reprinted verbatim in the Appendix.

STATEMENT OF THE CASE

On December 28, 2000, Petitioner Wanda Baker purchased a Ford Escort from Respondent (hereinafter "Defendant") Sunny Chevrolet by signing numerous documents, including a retail installment sales contract ("RISC") containing the cost-of-credit disclosures mandated by the Truth In Lending Act. Prior to leaving the dealership, Ms. Baker asked for a copy of the documents she had signed but Defendant's Finance Manager refused to provide Ms. Baker with a copy of the RISC. Ms. Baker left the dealership without having received a copy of the RISC. Defendant never gave Ms. Baker a copy of the RISC in a form that she could keep.

On January 11, 2001, Petitioner Baker and Petitioner Scott Zalewski (hereinafter "Plaintiffs") returned to the dealership, met with Defendant's Finance Manager, and signed a second RISC. Prior to leaving the dealership, Ms. Baker and Mr. Zalewski asked Defendant's Finance Manager for a copy of the documents they had signed, but he refused to give them a copy of the second RISC. Plaintiffs left the dealership without having received a copy of the second RISC. On January 29, 2001, Plaintiffs received by mail from Defendant the purchasers' copy of the second RISC which they had signed on January 11, 2001.

Plaintiffs brought suit, claiming Sunny Chevrolet violated the TILA, 15 U.S.C. §1601 *et seq*

and its companion Regulation Z, 12 C.F.R. § 226.17, by failing to provide them with copies of their RISC in a form that they could keep prior to consummation of the transactions, and that Defendant was liable for statutory damages under 15 U.S.C. §1640(a) for its violation of the Act.

In the course of this litigation, Defendant's finance manager testified that it was the practice and policy of Defendant to give the customer a copy of the RISC to keep only after the customer signed the contract, and that Defendant never gave the customer a copy of the contract to keep before the customer signed the contract.

The District Court granted Defendant's motion for summary judgment and dismissed Plaintiffs' complaint in its entirety, holding that Plaintiffs had no claim for statutory damages under 15 U.S.C. §1640(a). Plaintiffs appealed to the Sixth Circuit Court of Appeals, which affirmed the District Court's decision on the additional grounds that any violation could be cured under 15 U.S.C. §1640(b).

ARGUMENT

A. This Court Should Resolve the Conflict Between the Third and Sixth Circuits as to Whether the Correction of Errors Defense Set Forth in §1640(b) of the TILA Applies to Non-Clerical Errors.

Supreme Court Rule 10(a) provides that a petition for certiorari may be granted if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." The Sixth Circuit's holding that §1640(b) of the TILA may be invoked by creditors to avoid liability for failure to comply with the timing and form requirements of §1638(b)(1) of the Act conflicts with the United States Court of Appeals for the Third Circuit's holding in *Thomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246 (3rd Cir. 1980). In *Thomka,* the Third Circuit held that §1640(b) applied only to computational errors. *Id.* at 251.

Resolution of this conflict is necessary not only to avoid confusion in the lower federal courts, but to prevent erosion of Congress's express goal for the TILA of providing consumers the opportunity to shop for credit ***before*** entering into a credit transaction. 15 U.S.C. 1601(a). The Sixth Circuit's misreading of §1640(b) of the TILA rewrites the timing and form requirements of §1638(b)(1) of the Act by permitting creditors to deliver documents to consumers within sixty days ***after*** consummation of credit transactions.

This Court should grant this petition for certiorari and adopt the holding of the Third Circuit in *Thomka* that the correction of errors defense set forth in §1640(b) can be invoked only in instances where there is a computational, rather than informational, error.

B. The Third Circuit in *Thomka* Correctly Held That the Truth In Lending Act Correction of Error Defense Under 15 U.S.C. §1640(b) is Available Only for Computational Errors.

The words of 15 U.S.C. §1640(b) are unambiguous and must be interpreted according to their plain meaning:

> (b) **Correction of errors**
> A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any part or part E of this subchapter, if within sixty days after discovering an error [. . .] and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error ***and makes whatever adjustments in the appropriate account are necessary*** to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower. 15 U.S.C. §1640(b) [Emphasis added.]

By couching the correction of errors defense ***solely*** in terms of permitting creditors to avoid

liability by making "adjustment[s]" to "accounts" which overcharge the consumer due to an error, Congress made clear that §1640(b) applies only to ***computational errors***. The Court of Appeals for the Third Circuit reached this conclusion in *Thomka v. A. Z. Chevrolet, Inc.*, 619 F.2d 246 (3rd Cir. 1980). In *Thomka,* the defendant creditor did not give the plaintiff consumer a copy of the his credit disclosures in a form that he could keep until one week after consummation of the underlying credit transaction, in violation of §1638(b)(1). The defendant asserted a correction of errors defense under §1640(b) of the TILA. The Third Circuit rejected the defendant's argument, stating:

> The original draft of the [Truth In Lending] Act permitted no errors, but, in response to fears that simple clerical mistakes in mathematical calculations of the lease financial charge and annual percentage rate would create unavoidable liability, see Hearings on S.5 Before the Subcomm. On Financial Institutions of the Senate Comm. On Banking and Currency, 90th Cong., 1st Sess. 64ff., 226, 374, 426-27, 529, 584, 698 (1967); the affirmative defenses of Section 1640(c), as well as of §1640(b), were added. See *Ratner v. Chemical Bank New York Trust Company*, 329 F. Supp. 270, 280-81 (S.D.N.Y. 1971), *quoting* S. Rep. No. 392, 90th Cong., 1st Sess. 1

(1967) and n. 17 (discussing legislative history).

* * *

[The defendant cannot] avail itself of the §1640(c) (*sic*)[1] defense, which exempts the creditor from liability when notification of the error is made within fifteen (15) days of its discovery. [The defendant] claims that the delivery to and signature by [the Plaintiff] of the new disclosure form met this requirement.

* * *

Section 1640(b) itself states that when a notice of error has been made, the credit must make "whatever adjustments in the appropriate account (that) are necessary to insure that the person will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed." ***The provision thus refers to mathematical, not informational errors generally.*** Notice

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[1] It is apparent from the context of the opinion that the Third Circuit intends to refer to 15 U.S.C. §1640(b). Prior to its amendment in 1980, §1640(b) gave creditors only fifteen (15) days to correct computational errors under §1640(b).

> in a case such as this where there were informational errors would be ineffectual, since there are no lower mathematical figures on which the remedial cost would be calculated. It is therefore possible that providing exemption under Section 1640(b) in cases like this would provide an incentive for lenders to delay sending disclosure forms until after the agreement is reached.

619 F.2d, 246 at p. 250-251 (emphasis added). The Third Circuit's holding is consistent with the plain language of the provision, and with the congressional purpose of the TILA. It preserves both the creditors' right to correct computational errors and the consumers' right to receive disclosures in a form they can keep prior to consummation of the credit transaction pursuant to §1638(b)(1) and Regulation Z, 12 C.F.R. §226.17. In contrast, the Sixth Circuit's decision in *Baker* renders the timing and form requirements of §1638(b)(1) and Regulation Z, 12 C.F.R. §226.17 illusory.

The Sixth Circuit in *Baker* held that §1640(b) shields lenders from liability not only for computational errors, but for violations of §1638(b)(1) of the Act. Thus, under the Sixth Circuit's interpretation, so long as the creditor delivers the required disclosures to the consumer in a form she can keep within sixty (60) days ***after*** the credit transaction, the creditor has "corrected an error"

for purposes of §1640(b), and thus may avoid liability under the Act. *Baker v. Sunny Chevrolet, Inc.* 349 F. 3d 862, 871 (6th Cir. 2003).[2] This Court should grant this petition and adopt the Third Circuit's more well-reasoned interpretation of §1640(b).

C. The Sixth's Circuit's Interpretation of §1640(b) Renders the Timing and Form Requirements of §1638(b)(1) Meaningless.

"It is a cardinal principle of statutory construction that the statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." *TRW, Inc. v. Andrews,* 534 U.S. 19, 31 (2001), cited in *Baker,* supra at 871. The *Baker* decision violates this "cardinal principle" by stripping consumers of their right, explicitly granted by Congress in §1638(b)(1), to receive disclosures ***before*** consummation of a credit transaction. In fact, as noted in *Thomka,* supra at 251-252, application of §1640(b) to non-computational error provides incentive to creditors to withhold documents from consumers until after consummation of credit transaction because they face no liability for doing so.

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[2] The Sixth Circuit's decision also does violence to the plain meaning of the term "error" by permitting it to encompass ***intentional*** acts such as Defendant's admitted refusal to give Plaintiff Baker a copy of her RISC at the time of consummation pursuant to an established practice.

The Sixth Circuit's interpretation of §1640(b) gives lenders an "automatic extension of time" in which to deliver the disclosures required by the TILA to consumers. *Id.* at 252. This extension has the untenable effect of writing the timing and disclosure requirements of the §1638(b)(1) out of the TILA. In order to preserve the clear intentions of Congress in codifying §1638(b)(1), this Court should grant this petition and adopt the holding of the Third Circuit in *Thomka* that the correction of errors defense set forth in §1640(b) of the TILA applies only to computational errors.

D. This Court Should Resolve the Issue of Whether Statutory Damages Under §1640(a) Are Available for Violations of §1638(b)(1) of the Truth In Lending Act.

Supreme Court Rule 10(c) provides, in pertinent part, that a petition for a writ of certiorari may be granted if "a state or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . ." This Court has not settled the issue of whether statutory damages under the TILA, 15 U.S.C. §1640(a) are available for violations of §1638(b)(1), which sets forth the time and form in which the disclosures mandated by the TILA must be made. A decision by this Court would resolve the confusion in the lower federal courts surrounding this important issue.

Proper application of §1640(a) and §1638(b)(1) is critical to achieving the congressional goal for the

TILA of "assur[ing] a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. §1601(a). Yet, the lower federal courts in several circuits, including the sixth, seventh, eighth and eleventh, have expressed uncertainty as to how these two subsections interact, and have published variant decisions on the issue. See e.g. *Brown v. SCI Funeral Services of Florida,* 212 F.R.D. 602, 606-607 (S.D. Fla. 2003) (noting the "split among the districts" as to whether statutory damages are available for violations §1638(b)(1)); *Lozada v. Dale Baker Oldsmobile, Inc.,* 145 F. Supp. 2d 878, 885-887 (finding the plaintiff entitled to statutory damages under §1640(a) for the defendant's violation of §1638(b)(1); *Walters v. First State Bank,* 134 F. Supp. 2d 778, 782 (W.D. Va. 2001) (finding the plaintiff entitled to statutory damages under §1640(a) for the defendant's violation of §1638(b)(1)); compare *Brown v. Payday Check Advance, Inc.,* 202 F.3d 987, 992 (7th Cir. 2000) (finding the plaintiff not entitled to statutory damages under §1640(a) for the defendant's violation of §1638(b)(1)); *Stevens v. Brookdale Dodge, Inc.,* 2002 U.S. Dist. LEXIS 25406, *9-10 (Minn. 2002) (noting that there are "two lines of authority on the question whether section 1640(a) authorizes statutory damages for a violation of section 1638(b)(1)," and deciding that statutory damages are not available for such a violation).

Given the uncertainty in the lower federal courts, this Court should grant this petition for a writ

of certiorari and settle the issue of whether violations of §1638(b)(1) of the TILA are subject to statutory damages under §1640(a)(1).

E. The Sixth Circuit's Interpretation of 15 U.S.C. §1640(a) of the Truth In Lending Act is Contrary to the Statute's Plain Language.

The Sixth Circuit's interpretation of §1640(a) of the TILA does violence to its plain language and, as a consequence, undermines the Act's stated congressional purpose of putting credit terms in consumer's hands prior to consummation of credit transactions. This Court has consistently held that the construction of a statute should begin with its plain language. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 373 (2000) ("The Department's reading points us directly to the necessary starting point of any exercise in statutory interpretation--the plain language of the statute.") The relevant part of 15 U.S.C. §1640(a) reads as follows:

> ***Except as otherwise provided in this section, any creditor who fails to comply with any requirement*** imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person ***is liable*** to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, ...

****

In connection with ***the disclosures*** referred to in subsections (a) and (b) of section 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, section 1637(a) of this title, or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637(b) of this title

* * *

In connection with ***the disclosures*** referred to in subsection (c) or (d) of section 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637(c)(1)(A)(ii)(I) or section 1637(c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with ***the disclosures*** referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only

> for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title . . . [Emphasis added.]

As is clear from the section's first clause, "***Except as otherwise provided in this section***", the statute's provision for a mandatory award of statutory damages for "any" violation is all-inclusive, subject only to the specific exceptions that follow. The use by Congress of the word "any" admits no exception. *Hutto v. Finney*, 437 U.S. 678, 694 (1978) ("could not be broader....contains no hint of an exception"); *Brooks v. United States*, 337 U.S. 49, 51 (1949).

The exceptions that follow do not include a violation of the form and timing requirements of 15 U.S.C. §1638(b)(1) which the Defendant in *Baker* admittedly violated. The exceptions refer only to the ***disclosures*** referred to in section 1638," which include only §1638(a). Therefore, not being subject to any enumerated exception, the plain language imposes statutory damages for violations of the form and timing requirements of 15 U.S.C. §1638(b)(1). This interpretation of the statute was thoroughly treated and ultimately adopted in *Lozada v. Dale Baker Oldsmobile, Inc.*, 145 F.Supp.2d 878 (W.D. Mich. 2000).

Contradicting *Lozada* and the tenets of proper statutory interpretation, the Sixth Circuit chose to

ignore the all-inclusive language of §1640(a) (bold and italicized above), thereby transforming §1640(a) from a broad grant of authority to assess statutory damages for violations of the TILA to one that limits statutory damages to the handful of violations enumerated later in §1640(a). Put simply, the interpretation allows the exceptions to swallow the general rule. Such a reading of the statute abandons its plain language, runs afoul of sound rules of statutory construction, and ignores the well settled principle that the TILA must be construed liberally in the consumer's favor. *Roberts v. Fleet Bank, 342 F.3d 260, 266* (3rd Cir. 2003); *Fairley v. Turan-Foley Imports, 65 F.3d 475, 482* (5th Cir. 1995); *Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037, 1040 (6th Cir. 1984).

In its decision, the Sixth Circuit admits that the interpretation of §1640(a) posited in *Lozada* finds support in the case law and is, on its face, as correct an interpretation of §1640(a) as that ultimately adopted by the Court. *Baker*, supra at 869. In fact, the interpretation of §1640(a) set out in *Lozada* is not only consistent with the plain language of the statute, it advances the explicit congressional goals for the TILA. The interpretation adopted by the Sixth Circuit directly undermines those goals.

F. Congress Clearly Intended Violations of §1638(b)(1) to be Subject to Statutory Damages.

At its core, the TILA is a disclosure statute. 15 U.S.C. §1601(a). The purpose of the TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." *Id.* Disclosure of the essential financing terms of the transaction permits the objectives of the statute to be achieved. See *Wachtel v. West*, 476 F.2d 1062, 1065 (6th Cir. 1973).

To effectuate the purpose of the TILA set forth in §1601(a), Congress set as its objective arming consumers with proposed terms of credit ***before*** the closing of a loan agreement, thus "permit[ting] consumers to compare the cost of credit among different creditors and to shop effectively for the best credit buy." See *Ratner v. Chemical Bank New York*

Trust Company, supra, 329 F. Supp. at 276, *quoting* S. Rep. No. 392, 90th Cong., 1st Sess. 1 (1967).[3]

The TILA's various provisions must be interpreted in the manner that effectuates the Act's goal of providing disclosures prior to the credit transaction. In addition, these disclosures must be made in a form that can be "kept" prior to consummation. *Polk v. Crown Auto*, 221 F. 3rd 691, 692 (4th Cir. 2001), *Lozada v. Dale Baker Oldsmobile*, 197 F.R.D. 321, 336-37 (W.D. Mich 2002).

The statutory provision that animates the objective of meaningful disclosures in a form that can be kept prior to consummation is §1638(b)(1) of the TILA and the related Regulation Z, 12 C.F.R. §226.17 *et seq*, which describe when and how the credit disclosures are to be delivered to consumers. These provisions are at the heart of the congressional goal of enabling consumers to comparison shop for credit.

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[3] The Fourth Circuit recently recognized that the central purpose of TILA is to provide disclosures to a consumer ***prior to*** entering a credit transaction. *Nigh v Koons Buick Pontiac GMC*, 319 F3d 119, 124 (4th Cir 2003)(TILA's express purpose [is] protecting consumers from receiving inadequate disclosures prior to their entering into credit transactions.) The absence of Supreme Court authority recognizing the centrality of the pre-agreement disclosure requirements of the TILA to its congressional purposes weighs in favor of granting this petition.

Without timely disclosure of the essential financing terms as required by §1638(b)(1), the aims of the statute are rendered illusory. See *In re Williams*, 232 B.R. 629, 639 (Bankr. E.D. Pa. 1999) (not providing a consumer with a copy of TILA disclosures "manifests a failure to 'disclose,' as is required in the case of all information called for by U.S.C. §1638"). No consumer can comparison shop if the disclosure is made ***after*** the transaction is con-summated.

As noted in *Walters v. First State Bank*, 134 F. Supp. 2d 778, 780 (N.D. Va. 2002):

> The Truth in Lending Act ("TILA"), 15 U.S.C. §1601, *et seq.*, as implemented by Regulation Z, 12 C.F.R. pt. 226, was designed by Congress as a **tool** "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him . . . and to protect the consumer against inaccurate and unfair credit billing . . . practices." 15 U.S.C. §1601(a).

(Emphasis added). Thus, the act of disclosure transforms the substantive "disclosures" delineated under §1638(a) from what are otherwise a mere abstraction to information that is available to the consumer for use. For these reasons, §1640(a) provides that failure to timely disclose the essential terms identified in §1638(a)(2)-(6) and (9) pursuant to §1638(b)(1) entitles the consumer to statutory

damages. This comports with the policy behind TILA statutory damages. See *In re Marshall,* 121 B.R. 814 (Bankr. C.D. Ill. 1990) (statutory damages under TILA are designed to deter future violations).

The Sixth Circuit's decision deals a direct blow to the stated congressional purpose of the TILA by actually ***encouraging*** non-compliance with its disclosure requirements. Under the Sixth Circuit's reading of §1640(a), a consumer who receives a disclosure, albeit an untimely one, is disqualified from recovering statutory damages. Statutory damages are instead limited to those consumers who ***at some point*** received a disclosure of the material terms identified in §1638(a)(2)-(6) or (9) and could demonstrate their inaccuracy beyond the tolerances established by the Act. Taken to its logical extreme, so long as a creditor made ***no disclosures*** it could avoid statutory damages.

In sum, the Sixth Circuit's interpretation of §1640(a) effectively writes timely disclosure out of the statutory requirements by immunizing the creditor from exposure to statutory damages for untimely delivery. Indeed, should the Sixth Circuit's decision

stand, creditors will be encouraged to withhold disclosures until after con-summation to avoid statutory damages.[4] In order to preserve Congress's stated goal for the TILA of requiring meaningful disclosures of credit terms prior to consummation, this petition for a writ of certiorari should be granted.

G. Conclusion.

If the Sixth Circuit's interpretation of §1640(a) and §1640(b) of the TILA is allowed to stand,

---

[4] The reality is that statutory damages are the only remedial relief available to consumers because actual damages for violations of §1638(b)(1) are, for all practical purposes, nonexistent. Congress recognized this reality in authorizing statutory damages:

> TILA allows a consumer to recover both actual and statutory damages in connection with TILA violations. Congress provided for statutory damages because ***actual damages in most cases would be nonexistent or extremely difficult to prove.*** To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure.

H.R. Rep. No. 193, 104, 104th Cong., 1st Sess. (1995)(emphasis added); See also *Turner v. Beneficial Corporation,* 242 F.3d 1023, 1028 (11th Cir. 2001).

creditors will have no incentive to comply with the timing and form requirements of § 1638(b)(1), and the primary congressional purpose of the TILA--putting credit terms in the hands of consumers ***prior to*** consummation of credit transactions--will be severely undermined.

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the Sixth Circuit's decision in *Baker* reversed.

Respectfully Submitted

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Dated: March 29, 2004

APPENDIX A

Baker v. Sunny Chevrolet, Inc.

No. 02-1381

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

349 F.3d 862; 2003 U.S. App. LEXIS 22630; 2003 FED App. 0391P (6th Cir.)

September 11, 2003, Argued
November 4, 2003, Decided
November 4, 2003, Filed

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by Baker v. Sunny Chevrolet, Inc., 2003 U.S. App. LEXIS 26619 (6th Cir., Dec. 29, 2003)

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Michigan at Grand Rapids. No. 01-00109. Robert Holmes Bell, Chief District Judge. Baker v. Sunny Chevrolet, Inc., 2002 U.S. Dist. LEXIS 4139 (W.D. Mich., Mar. 7, 2002)

DISPOSITION: Affirmed.

JUDGES: Before: KENNEDY, GUY, and DAUGHTREY, Circuit Judges. KENNEDY, J., delivered the opinion of the court. GUY, J., delivered a separate concurring opinion, in which DAUGHTREY, J., joined.

OPINIONBY: KENNEDY

OPINION: [*863] [***2]

KENNEDY, Circuit Judge. This case presents an appeal from the district court's order granting summary judgment in favor of Defendant-Appellee Sunny Chevrolet. Plaintiffs-Appellants Baker and Zalewski argue that the district court erred when it determined that even if Defendant had violated 15 U.S.C. § 1638(b)(1), Defendant was not liable for statutory [**2] damages. We AFFIRM.

BACKGROUND

On December 28, 2000, Plaintiff Baker signed a retail installment sales contract ("RISC") to purchase a car and took possession of the vehicle on that date. Although she asked for a copy of the contract, Defendant refused the request. On January 11, 2001, citing inability to obtain [***3] financing under the RISC, n1 Defendant requested that Plaintiffs return to the dealership to re-execute the deal adding the latter as a buyer. At the dealership, Defendant informed Plaintiffs that they would each have to sign a second contract. [*864] Once again, despite being asked for a copy of the signed contract, Defendant refused to

provide Plaintiffs with a copy of either contract. Plaintiffs finally received a copy of the second contract approximately three weeks later, around January 29, 2001. Plaintiff Baker never received a copy of the first contract that she signed. It is undisputed that Plaintiffs were given the actual RISC document for review prior to signing it and that the actual RISC accurately disclosed all of the transactions' credit terms.

> n1 In a typical RISC transaction, a dealer sells a vehicle to a customer promising a certain type of financing which it hopes to obtain from a third party. Problems arise, however, if the dealer is unable to obtain the expected financing.
>
> [**3]

Plaintiffs filed a class action lawsuit for violations of Truth in Lending Act ("TILA") and the underlying Regulation Z, alleging that Defendant repeatedly failed to give the consumer "a copy of the contract [in connection with the purchase and finance of a motor vehicle] to keep prior to consummation of the transaction." First Am. Class Action Compl. J.A. at 9. Plaintiffs, however, do not allege any actual damages, nor do they claim that any of the disclosures that were made before they signed the RISC were inaccurate. Plaintiffs sued only for statutory damages under 15 U.S.C. §1640. The district court, per order dated February 6, 2002, denied the motion for class certification because the Plaintiffs were not typical of their proposed class and because the class definition was inadequate. The district court also, per order

dated March 8, 2002, granted Defendant's motion for summary judgment and dismissed Plaintiffs' complaint in its entirety on the basis that Defendant's refusal to provide the copies of the disclosures, while "seemingly inappropriate," could not give rise to TILA statutory damages. Plaintiffs appealed both orders to this [***4] Court. [**4] Both sides, however, only briefed the issue of statutory damages. Plaintiffs asked for reconsideration of the class certification ruling pending a reversal of the statutory damages ruling.

STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo. Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996). In deciding a summary judgment motion, this court cannot weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter asserted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). We must, however, view the evidence and draw all "justifiable inferences" in the light most favorable to the non-movant. *Id.* Summary judgment is appropriate where "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment..." *Anderson*, 477 U.S. at 247-48 (emphasis [**5] in original). Mixed questions of law and fact are

reviewed *de novo*. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (*en banc*).

ANALYSIS

Congress enacted TILA in 1968 with the broad purpose of promoting the informed use of credit by assuring meaningful disclosure of credit terms to consumers. *See generally*, 15 U.S.C. § 1601(a); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980); *Begala v. PNC Bank, N.A.*, 163 F.3d 948, 950 (6th Cir. 1999). This Court has held that the statute must be considered liberally in the consumer's favor. *Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037, 1040 (6th Cir. 1984). The sections of TILA principally involved here are 15 U.S.C. § § 1638(a) [***5] n2 and 1638(b), n3 which [*865] required creditors to make specific disclosures, and 15 U.S.C. § 1640(a), n4 which provides consumers with a cause of action for certain violations of the act. Also of relevance on this appeal is Regulation Z, 12 C.F.R. § 226.1, *et seq.*, a regulation promulgated [**6] by the Federal Reserve Board to implement [***6] TILA. Regulation Z prescribes the form in which a creditor must disclose the items pursuant to 15 U.S.C. § 1638. n5

n2 15 U.S.C. §1638(a) contains substantive requirements of the creditor's disclosures.

n3 15 U.S.C. §1638(b) contains the form and timing of the §1638(a) disclosures.

n4 The section provides:

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part...with respect to any person is liable to such person in an amount equal to the sum of-
> (1) any actual damage sustained by such person as a result of the failure;
> (2)(A)(I) in the case of an individual action twice the amount of any finance charge in connection with the transaction...(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $ 500,000 or 1 per centum of the net worth of the creditor...
> In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this

> title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title...

15 U.S.C. § 1640(a). [**7]

n5 Regulation Z provides, in relevant part, that "the creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. §226.17(a)(1). It further provides that creditors are required to make the mandated disclosures "before con-summation of the transaction." 12 C.F.R. §226.17(b).

The district court assumed, without so holding, that Defendant violated § 1638(b)(1). n6 It then held that statutory damages were not available for this violation. *Baker v. Sunny Chevrolet, Inc.*, 2002 U.S. Dist. LEXIS 4139, No. 1:01-CV-109 (W.D. Mich. March 8, 2002). The District Court further held that failure to provide Plaintiffs with a copy of their contracts at signing did not entitle Plaintiffs to statutory damages for violations of 15 U.S.C. §§1638 (a)(3)-(a)(6), 1638(a)(9). n7

n6 The section provides:

> Except as otherwise provided in this part, the disclosures required under subsection (a) of this section shall be made before the credit is extended.

> Except for disclosures required under subsection (a)(1) of this section, all disclosures required under subsection (a) of this section... shall be conspicuously segregated from all other terms, data, or information provided in connection with a transaction, including any computations or itemization.

15 U.S.C. § 1638(b)(1). [**8]

n7 These section require disclosure of the finance charge, 15 U.S.C. § 1638(a)(3), the annual percentage rate, 15 U.S.C. § 1638(a)(4), the total of payments, 15 U.S.C. § 1638(a)(5), the timing and amount of periodic payments, 15 U.S.C. § 1638(a)(6), and the existence of a security interest, 15 U.S.C. § 1638(a)(9). Plaintiffs claimed that failure to provide them with a copy of these disclosures constituted a complete failure to disclose.

1. Plaintiffs are not entitled to Statutory Damages for Violations of 15 U.S.C. § 1638(b)(1)

Plaintiffs argue that Defendant violated the form and timing requirements of § 1638(b)(1) of TILA, and the related [***7] provisions of Regulation Z. Regulation Z provides, in relevant part, that "the creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may [*866] keep." 12 C.F.R. § 226.17(a)(1). Defendant first argues that this [**9] Court should

assume without deciding, as did the District Court, that a violation of § 1638(b)(1) occurred. Defendant then argues that statutory damages are not recoverable for violations of § 1638(b)(1) because consumers aggrieved by disclosure violations of § 1638 may seek statutory damages only in those case involving violations of § § 1638(a)(2)(some), (3)-(6), (9).

As noted above, the district court assumed for the purposes of the summary judgment motion that a violation of § 1638(b)(1) took place. Plaintiffs urge us to go beyond the district court's opinion and find that a violation did actually occur. This Court will typically refrain from considering issues not passed upon by the lower courts. *See, e.g., Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross and Blue Shield Ass'n*, 110 F.3d 318, 335 (6th Cir. 1997). This restraint, however, is simply a matter of discretion, as the Courts of Appeals remain free to resolve such issues if the "proper resolution is beyond doubt" or "'where injustice might otherwise result.'" *Id.* (citing *Singleton v. Wulff*, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976). Defendant relies on the district [**10] court's discussion in its opinion denying class certification to argue that proper resolution is not beyond doubt. *BAKER v. SUNNY CHEVROLET INC.*, 2002 U.S. Dist. LEXIS 26947 (W.D. Mich. Feb. 6, 2002) ("Because the facts have not been fully developed, the Court cannot determine whether a violation has occurred.") Plaintiffs do not address this argument in the appellate brief. We decline to resolve the factual question of whether a violation occurred and instead

assume, as did the district court, that a violation did occur.

The district court, relying heavily on a Seventh Circuit decision, found that statutory damages are not available for a violation of § 1638(b). The Seventh Circuit found that: [***8]

Statutory damages are available, this final sentence says, "*only* for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the 'amount financed'), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for" other situations not presented by these cases. "Only," the word we have italicized is conclusive against plaintiffs, for it confines statutory damages to a closed list. Failure [**11] to emphasize the typeface of "finance charge" and "annual percentage rate" violates § 1632(a); omission of descriptive explanations violates §1638(a)(8); appearance of extra matter in the federal box violates § 1638(b)(1). None of these subsections is on the list of violations eligible for statutory damages.

Baker v. Sunny Chevrolet Inc., 2002 U.S. Dist. LEXIS 4139, No. 1:01-CV-109 (quoting *Brown*, 202 F.3d, 987, 991 (7th Cir. 2000)). The District Court also noted that a number of district courts outside the Seventh Circuit have followed the *Brown* decision. 2002 U.S. Dist. LEXIS 4139.

Plaintiffs, relying almost exclusively on Lozada v. Dale Baker Oldsmobile, Inc., 145 F. Supp. 2d 878

(W.D. Mich. 2000), argue that the Seventh Circuit and the district court misread § 1640(a) to reach their respective holdings. The *Lozada* opinion makes a very intricate argument that the § 1640(a) discussion of statutory damages simply does not apply *at all* to § 1638(b)(1) claims. In other words, the limitation on the availability of statutory damages in § 1638 violations applies only to "disclosures" in section § 1638 and § 1638(b)(1) is not a "disclosure" [**12] but is merely a "form and timing of disclosure" requirement. *Lozada*, 145 F. Supp. 2d at 888 (noting that "such a reading is consistent with the [*867] other types of violations described by the enumeration.'"). *See also Daenzer v. Wayland Ford, Inc.*, 193 F. Supp. 2d 1030, 1036-37 (W.D. Mich. Mar. 15, 2002) (discussing both *Brown* and *Lozada* and adopting the reading in *Lozada*). *But see Kilbourn v. Candy Ford-Mercury*, 209 F.R.D. 121, 126-27 (W.D. Mich. Mar. 11, 2002) (discussing both *Brown* and [***9] *Lozada* and adopting the reading in *Brown*). According to this position, § 1638(b) is not mentioned in the discussion of limitation on damages and thus a full array of damages is available for its violation. The problem with this interpretation, however, is that, standing alone, the "form and timing" requirement has no substance, it only makes sense if it is combined with substantive disclosures of § 1638(a). For example, § 1640(a) applies to disclosures referred to in subsections (a) and (b) of section 1637. Each subsection of § 1637 contains its own "timing" requirement. n8 It would therefore seem that untimely disclosure [**13] of items in § 1637(a) and (b) would be subject to § 1640(a) statutory damages.

15 U.S.C. § 1640(a). We therefore reject this reading of the statute.

n8 *See, e.g.*, 15 U.S.C. § 1637(a) ("*Before opening any account* under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is extended each of the following items...") (emphasis added); 15 U.S.C. § 1637(b) ("The creditor of any account under an open end consumer credit plan shall transmit to the obligor, *for each billing cycle at the end of which there is an outstanding balance in that account...*, a statement setting forth each of the following items to the extent applicable.") (emphasis added).

Plaintiffs, relying once again on *Lozada*, make a following second argument in the alternative:

> However, if a failure to deliver disclosures under §1638(b) is considered a "disclosure [] referred to in section 1638" within the meaning [**14] § 1640, then the failure to deliver disclosures in the manner provided by §1638(b)(1) must be considered failure to disclose the required terms under §1638(a). The requirements of §1638(b)(1) may not be considered 'disclosures' for purposes of §1640 and yet not part of the disclosure requirements of §1638(a). Moreover, no basis exists for considering a disclosure made if it is not made in accordance with the requirements of §1638(b)(1). Since §1638(b)(1) expressly

> provides the form and time in [***10] which disclosures under §1638(a) must be made, §1638(a) disclosures may not be said to be made unless and until they are made in compliance with §1638(b)(1). Section 1638(b), by saying when and how a disclosure is made, becomes part of the definition of what constitutes a 'disclosure' under TILA.

Lozada, 145 F. Supp. 2d at 889.

Defendant, relying on *Brown*, argues that such a reading of TILA creates a back door theory that the alleged failure to make timely written disclosures is not a disclosure at all. Defendant's reliance on *Brown*, however is misplaced. In *Brown*, the defendant provided the plaintiff with a timely written [**15] disclosure. The problem in *Brown* was that there were two minor errors in the actual disclosure which resulted in violations of § 1638(a)(8) and § 1632(a), neither of which is an enumerated violation contained in § 1640(a). *Brown*, 202 F.3d at 990. The *Brown* court then rejected a back door theory that "information has been 'disclosed' in compliance with § 1638 only if all of the TILA and all of Regulation Z have been followed." *Id.* at 991. The *Brown* court went on to explain that

> Accepting this argument would destroy the point of § 1640(a). What sense would it make to omit § 1632, § 1638(a)(1), (a)(2) (in part), (a)(7), (a)(8), [*868] (a)(10), (a)(11),

> (a)(12), and all of § 1638(b), (c), and (d) from the candidates for statutory damages if they came in through the back door on the theory *that all formal shortcomings infect the disclosures of the items that are on the list.*

Brown, 202 F.3d at 991 (emphasis added). On the facts before it, the *Brown* court properly rejected the back door theory. The facts of this case are clearly distinguishable, however, since Plaintiffs did not timely receive [**16] a copy of the RISC. Plaintiffs therefore allege that § 1638(a)(2), (3), (4), (5), (6), (9) were violated because disclosures required under those subsections were not properly made. [***11]

Defendant's reliance on two other cases to argue against Plaintiffs' position is likewise misplaced. In *Collins v. Ray Skillman Olds-GMC Truck, Inc.*, 2001 U.S. Dist. LEXIS 22239, 2001 WL 1711466 (S.D. Ind. Dec. 3, 2001), the court rejected an argument similar to the one advanced here by Plaintiffs. n9 However, the *Collins* court read *Brown* to reject the argument that "the alleged failure to make timely written disclosures was not a disclosure at all." *Collins*, 2001 U.S. Dist. LEXIS 22239, 2001 WL 1711466, at *3. As explained above, we believe that this is a misreading of *Brown*. In the second case, *Graham v. RRR, LLC*, 202 F. Supp. 2d 483, 485, 489 (E.D. Va. May 15, 2002), the court also rejected a similar argument advanced by a plaintiff who was allegedly asked to sign a blank retail installment sale contract. n10 There are several problems with relying on *Graham*. First, there was a factual dispute about whether the plaintiff signed a

blank RISC. 202 F. Supp. 2d at 489 n. 3. Second, [**17] the court actually dismissed the entire argument as "untimely raised." *Id.* at 489. After dismissing the case, the court engaged in a completely unnecessary dicta about the merits of the plaintiff's argument with a single reference to § 1638(a) and without any discussion of other courts' decisions. We therefore find its holding entirely unpersuasive.

n9 The only difference in facts was that the plaintiff in *Collins* never asked for a copy of the RISC, whereas Plaintiffs in this case did. The difference, in our opinion, however, is insignificant.

n10 Apparently, there were two RISCs involved here. First one had a 12.5 interest rate and the plaintiff was provided with a copy of it. Second one was supposed to be filled out if the defendant obtained a lower interest rate. There was a factual dispute as to whether the plaintiff signed a blank RISC.

As the foregoing discussion illustrates, we are therefore left with two readings of the statute, both of which find support in the relevant [**18] caselaw and neither of which appears to be clearly correct on its face. The two arguments can best be summarized as follows. [***12]

First, § 1638(b) form and timing disclosures should be read to apply to each subsection of § 1638(a) individually (i.e. § 1638(a)(3) is violated whenever a disclosure is not made prior to consummation of the sale and whenever it is not made in writing in a form

that a consumer may keep). It should not be read as an independent disclosure violation. This interpretation is supported by the language and structure of Regulation Z. 12 C.F.R. § 226.17, which is the first section under "Subpart C-Closed-End Credit," provides that "the creditor shall make the *disclosures required by this subpart* clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. § 226.17(a)(1) (emphasis added). Section 1638, titled "Transactions other than under an open end credit plan," is a section dealing with "closed-end credit" transactions, such as the one in this case. 12 C.F.R. § 226.2(a)(10) (defining "closed-end credit"). Requirements of § 1638(a) are explained [**19] in 12 C.F.R. § 226.18, which appears within the same Subpart C as does [*869] the general disclosure requirements of § 12 C.F.R. 226.17(a) and (b). The regulation therefore appears to demand that every "closed-end credit" disclosure be provided in this manner. *See, e.g., Polk v. Crown Auto, Inc.*, 221 F.3d 691, 692 (4th Cir. 2000) (per curiam) ("However, on balance we believe that the plain meaning of the regulation must be understood to be that written disclosure in the *form* specified in subpart (a) must be provided to the consumer at the *time* specified in subpart (b). That is, Crown Auto was required to make the disclosures to Polk in writing, in the form that he could keep, before consummation of the transaction.") (emphasis in the original). Finally, does not contain a "writing in a form the consumer may keep" requirement. There is, thus, no reason to conclude that the violation of 12 C.F.R. § 226.17 is a § 1368(b) violation and not a § 1368(a) violation.

Second, § 1638(b) is a separate requirement that relates only tangentially to the underlying substantive disclosure [**20] requirements of § 1638(a). Under this theory, a § 1638(b) violation is not one of the enumerated violations that warrant a statutory damages award. This theory thus creates two [***13] types of violations: (a) complete non-disclosure of enumerated items in § 1368(a), which is punishable by statutory damages; and (b) disclosure of the enumerated items in § 1368(a) but NOT in the manner required by the Regulation and § 1638(b)(1), which is not subject to the statutory damages. This theory still recognizes that the proper manner of making § 1638(a) disclosures is in writing, in the form that the consumer may keep. It also, however, recognizes that in a situation like the case at bar, where Plaintiffs were clearly not prejudiced by the untimely delivery of the RISC, n11 the failure to deliver the written disclosures in the form that the consumer may keep is actionable only if the consumer can show actual damages.

> N11 At oral argument, Plaintiffs' counsel conceded that Plaintiffs were not going to shop the Defendant's offer around but instead intended to complete the purchase.

[**21]

We now expressly adopt this second interpretation because it is the only way to reconcile the imposition of damages under § 1640(a) with the excuse of certain violations under § 1640(b). n12

n12 As explained below, § 1640(b) provides that the violations that are corrected within 60 days by the lender are not subject to statutory damages, assuming certain conditions are met. 15 U.S.C. § 1640(b). This provision leads us to conclude that Congress was more concerned with the accuracy of the disclosures (by imposing both actual and statutory damages) then with the timing of the disclosures (by imposing only actual damages). Were we to read these two subsections in the manner urged by Plaintiffs, we would have to assume that Congress simultaneously thought that the timing of the disclosures was (1) important enough to warrant statutory damages under § 1640(a) and (2) unimportant enough to excuse a delay in performance by as much as sixty days in the absence of actual damages under § 1640(b). Such a contradictory reading goes against the basic canons of statutory construction. *See, e.g., U.S. v. Branson*, 21 F.3d 113, 116 (6th Cir. 1994) (noting that statutes should not be read in a manner that renders them meaningless, that they must be read as a whole and construed to give each word operative effect, and that they should be interpreted to avoid untenable distinctions and unreasonable results whenever possible) (citations omitted).

[**22] [***14]

2. Section 1640(b) forecloses Plaintiffs' recover of any damages in this case.

The problem of resolving this complicated question of statutory construction is aided by the provisions in § 1640(b). Neither party briefed this issue on this appeal or before the district court. Nevertheless, our independent review of the statute leads us to the conclusion that the plain [*870] meaning of 15 U.S.C. § 1640(b) bars any recovery for Plaintiffs. *In re Allied Supermarkets, Inc.*, 951 F.2d 718, 725-26 (6th Cir. 1991) (recognizing that although in general appellate courts do not review questions raised for the first time on appeal, it is appropriate to do so when the question is a legal one). *See also Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248, 250 (4th Cir. 1971) ("if deemed necessary to reach the correct result, an appellate court may sua sponte consider points not presented to the district court and not even raised on appeal by either party.") (citing *U.S. v. Continental Can Co.*, 378 U.S. 441, 457, 470, 12 L. Ed. 2d 953, 84 S. Ct. 1738 (1964)).

Section 1640 is a general "civil liability" [**23] section in the TILA. In subsection (a) it provides for either actual and/or statutory damages for various TILA violations. Subsections (b) and (c) provide for (1) correction of errors, 15 U.S.C. § 1640(b), and (2) the treatment of unintentional violations and bona fide errors, 15 U.S.C. § 1640(c). More specifically, section 1640(b) provides:

> A creditor...has no liability under this section ...for any failure to comply with any requirement imposed under this part..., if within sixty days after discovering an error, ...and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor...notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of [***15] the annual percentage rate actually disclosed, whichever is lower.

15 U.S.C. § 1640(b). The applicability of this section is a matter of first impression in this Circuit and there [**24] appears to be very sparse discussion of it in the general caselaw. The Third Circuit has considered the argument that § 1640(b) applies solely to mathematical, not informational errors, such as failure to provide disclosures. *Thomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246, 251-52 (3rd Cir. 1980). The court went on to explain that

> Notice in a case such as this would be ineffectual, since there are no lower mathematical figures on which the remedial cost would be calculated. It is therefore possible that providing exemption under Section 1640(b) in case

> like this would provide an incentive for lenders to delay sending disclosure forms until after the agreement is reached.

Id. at 252. The Third Circuit, however, expressly chose not to resolve this question because the facts of its case indicated that the defendant never actually notified the plaintiff that there was a disclosure error. *Id. See also Molenbeek v. West Mich. Auto & Truck Outlet, Inc.*, 2001 U.S. Dist. LEXIS 3433, 2001 WL 1602654, at *4 (W.D. Mich. 2001) (expressing doubt that 1640(b) applies to non-written, non-calculation errors but nevertheless concluding simply that [**25] the defense does not apply because the defendant did not notify the plaintiff as the statute requires). In making its observations, the Third Circuit relied heavily on the legislative history as summarized in *Ratner v. Chemical Bank*, 329 F. Supp. 270, 281-82 and n. 17 (S.D.N.Y. 1971) (deciding the case dealing with a § 1640(c) defense only). *Thomka* and *Ratner* courts observed that "the original draft of the Act permitted no errors, but in response to fears that simple clerical mistakes in mathematical calculations of the lease financial charge and annual percentage rate would create unavoidable liability...the affirmative defenses of Section 1640(c), as well as Section 1640(b) were added." *Thomka*, [***16] 619 F.2d at 250-51. *See also Ratner*, 329 F. Supp. at 280-81 and n. 17. The problem [*871] with this interpretation of the legislative history of § 1640(b) is that § 1640(c) explicitly deals with "clerical, calculation, computer malfunction and programming, and printing errors." 15 U.S.C. §1640(c). Therefore the Third Circuit's and the

Southern District of New York's reading of the legislative history [**26] would render § 1640(b) meaningless. *See, e.g., TRW, Inc. v. Andrews*, 534 U.S. 19, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001) ("it is a cardinal principle of statutory construction that the statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.") (citations omitted); *Branson*, 21 F.3d 113 at 116. Furthermore, this reading is contradictory to the plain meaning of § 1640(b) since that subsection appears to give creditors a sixty-day window to correct any errors made as long as certain requirements are made. Although, as the Third Circuit noted, this may not make great policy, Congress clearly illustrated its ability to limit the types of errors covered when it enacted § 1640(c). We must respect its decision.

In this case, Defendant provided Plaintiffs with the copy of the RISC two weeks after the signing date, which was clearly within 60 days. Furthermore, there is no evidence in the record that Defendant received any written notice from Plaintiffs prior to the mailing of the RISC. Finally, Plaintiffs will not be required to pay an amount in excess of [**27] the charge actually disclosed since she was provided with a copy of the very document she signed.

CONCLUSION

In sum, we conclude that Defendant's failure to timely provide Plaintiffs with a copy of RISC does not entitle Plaintiffs to any statutory damages on the

alternative grounds (1) that § 1638(b)(1) violation is not subject to statutory damages and (2) that Defendant complied with § 1640(b) provisions for the correction of errors.

CONCUR BY: RALPH B. GUY, JR.,

CONCUR: [***17]

RALPH B. GUY, JR., Circuit Judge, concurring. I concur in the result and write separately to further clarify the reasons for affirming the decision to grant summary judgment to Sunny Chevrolet in this action for statutory damages under the Truth In Lending Act (TILA), 15 U.S.C. § 1640(a)(2). Like the district judge, I would assume, *arguendo*, a violation of the form and timing requirements of 15 U.S.C. § 1638(b), and its implementing regulation, Regulation Z, 12 C.F.R. § 226.17, both because resolution of the issue is unnecessary to this appeal and because the Federal Reserve Board has revised its Official Commentary to Regulation [**28] Z in an attempt to clarify the issue. *See* 12 C.F.R. Part 226, Supp. I, p. 434 (2003) ("*17(b) Time of Disclosures*"). I also agree that statutory damages are not available under § 1640(a)(2) for the violations alleged in this case for the reasons discussed below. I would not, however, reach the novel question of whether defendant could rely on § 1640(b) to escape damages for failure to comply with TILA's form and timing requirements because the issue was not developed either in the district court or on appeal.

The TILA was enacted with the "broad purpose of promoting 'the informed use of credit' by assuring 'meaningful disclosure of credit terms' to consumers." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980) (quoting 15 U.S.C. § 1601); *see also Begala v. PNC Bank, Ohio Nat'l Ass'n*, 163 F.3d 948, 950 (6th Cir. 1998). When called upon to interpret a statute, we must review "'the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *Walker v. Bain*, 257 F.3d 660, 666-67 (6th Cir. 2001) (citation omitted), [**29] *cert. denied*, 535 U.S. 1095, 152 L. Ed. 2d 1050, 122 S. Ct. 2291 [*872] (2002). We may not rely on the literal language when it would "lead to absurd results or an [***18] interpretation which is inconsistent with the intent of Congress." *Id.* at 667.

TILA governs disclosures required for "closed ended" transactions (like automobile loans), dictating the substantive disclosures that must be made in 15 U.S.C. §1638(a), the applicable form and timing requirements in 15 U.S.C. §1638(b)(1), and the damages available for violations of those provisions in 15 U.S.C. §1640(a). n1 The critical portions of § 1640(a) state as follows:

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person

is liable to such person in an amount equal to the sum of-

(1) any actual damage sustained by such person as a result of the failure;

(2)(A) (i) in the case of an individual action twice the amount of any finance [**30] charge in connection with the transaction [in statutory damages], ...

. . . . [***19]

. . . In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of ... paragraph (2) . . ., (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title.

Id. (emphasis added).

n1 Disclosures required for "closed ended" credit transactions include: (1) the identity of the creditor; (2) the "amount financed"; (3) the "finance charge"; (4) the "annual percentage

rate"; (5) the "total payments"; (6) the number, amount, and due dates or period of payments; (7) the total sale price; (8) descriptive explanations of specified terms; and (9) where credit is secured, a statement that the security interest has been taken. 15 U.S.C. §1638(a)(1)-(9). Further disclosures are required in certain circumstances by § 1638(a)(10)-(14). In addition to these "substantive" disclosures, the form and timing requirements of §1638(b)(1) state that the disclosures "shall be made before the credit is extended."
[**31]

The majority of decisions addressing the issue presented in this case have adopted the interpretation articulated by the Seventh Circuit in *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir.), *cert. denied*, 531 U.S. 820, 148 L. Ed. 2d 27, 121 S. Ct. 61 (2000), which reasons that the use of the term "only" in the final sentence confines statutory damages for any violations of § 1638 (including violations of §1638(b)(1)), to the closed list of enumerated subsections. n2 Plaintiffs urge this court to reject *Brown* and adopt a contrary interpretation articulated in *Lozada v. Dale Baker Oldsmobile, Inc.*, 145 F. Supp. 2d 878 (W.D. Mich. 2001). *See also Daenzer v. Wayland Ford, Inc.*, 193 F. Supp. 2d 1030, 1036-37 (W.D. Mich. 2002).

n2 *See, e.g., Kilbourn v. Candy Ford-Mercury, Inc.*, 209 F.R.D. 121, 124-25 (W.D. Mich. 2002); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F.

Supp. 2d 535, 548-49 (E.D. Va. 2001); *Molenbeek v. West Mich. Auto & Truck Outlet, Inc.*, 2001 U.S. Dist. LEXIS 3433, No. 1:00-CV-286, 2001 WL 1602654, at *5-6 (W.D. Mich. Mar. 15, 2001).

[**32]

The district court in *Lozada* reasoned that the first sentence of § 1640(a) represented a broad statement that statutory damages are available for violations of "any requirement imposed" by TILA, "except as otherwise provided." 145 [*873] F. Supp. 2d at 886 (quoting § 1640(a)). As for the list of subsections in the final sentence quoted above, the court [***20] found the list was "not a positive and exclusive enumeration of provisions for which statutory damages are provided," but rather, a "reverse description of exceptions." *Id.* As a result, the district court concluded that violators of § 1638(b) would remain subject to statutory damages because § 1638(b) is not enumerated for exception from the general rule.

While the structure of § 1640(a) makes the *Lozada* interpretation plausible, the language and design of these provisions convince me that the Seventh Circuit and a majority of district courts addressing the issue are correct in concluding that statutory damages are not available for violation of § 1638(b)(1). The limitation of the final sentence of § 1640(a) quoted above explicitly applies "in connection with the disclosures referred to in § 1638" [**33] -- not just § 1638(a) -- it also further states that statutory damages

are available *only for* the failure to comply with the enumerated subsections of § 1638(a). This interpretation is also consistent with the legislative history concerning the addition of the final sentence, which indicates that the amendments were intended to limit a creditor's liability for statutory penalties on "closed ended" transactions to disclosures of "the amount financed, the finance charge, the total of payments, the annual percentage rate, the number, amount and due dates of payments, any security interest taken, and, where applicable, the consumer's right to recission." *Kilbourn*, 209 F.R.D. at 127 n.4 (quoting S. Rep. No. 96-73, at 7 (1979) (*reprinted in* 1980 U.S.C.C.A.N. 280, 285)). Not coincidentally, these specified disclosures correspond directly to the sections enumerated in § 1640(a).

As an alternative theory, plaintiffs contend that statutory damages are available because the failure to comply with the form and timing requirements of § 1638(b)(1) constitutes a complete failure to make any of the substantive disclosures required by § 1638(a) -- including those for [**34] which statutory damages are expressly available. This argument fails to persuade as it would turn the stated congressional intent on its head. As the *Brown* court aptly reasoned: [***21]

> Accepting this argument would destroy the point of § 1640(a). What sense would it make to omit § 1632, § 1638(a)(1), (a)(2) (in part), (a)(7), (a)(8), (a)(10), (a)(11), (a)(12), and all of § 1638(b), (c), and (d)

> from the candidates for statutory damages if they came in through the back door on the theory that all formal shortcomings infect the disclosures of the items that *are* on the list? Congress included some and excluded others; plaintiffs want us to turn this into universal inclusion, which would rewrite rather than interpret § 1640(a).

202 F.3d at 991. *See also Kilbourn*, 209 F.R.D. at 127-28 [**35]

APPENDIX B

WANDA BAKER and SCOTT ZALEWSKI, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

SUNNY CHEVROLET INC., a Michigan corporation, d/b/a WAYLAND CHEVROLET, Defendant.

File No. 1:01-CV-109

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2002 U.S. Dist. LEXIS 26947
July 5, 2002, Decided

PRIOR HISTORY: Baker v. Sunny Chevrolet, Inc., 2002 U.S. Dist. LEXIS 4139 (W.D. Mich., Mar. 7, 2002)

DISPOSITION: [*1] Plaintiffs' motion for class certifica-tion denied.

JUDGES: ROBERT HOLMES BELL, CHIEF UNITED STATES DISTRICT JUDGE.

OPINION BY: ROBERT HOLMES BELL

OPINION:

Before this Court is Plaintiffs' motion for class certification pursuant to FED. R. Civ. P. 23 ("Rule 23").

Previously, the Court granted Defendant's motion to decline supplemental jurisdiction over state law claims, denied Defendant's motion for judgment on the pleadings, and directed the Plaintiffs to clarify the complaint. The basic claim is that under the Truth in Lending Act ("TILA"), Defendant failed to provide Plaintiffs and others with a copy of TILA disclosures before the transaction was consummated. For the reasons explained below, Plaintiffs' motion for class certification is DENIED.

I.

Plaintiffs [*2] were not provided with a copy of TILA disclosures before they signed their retail installment sales contract ("RISC") when they purchased a car from Defendant. In fact, Plaintiffs did not receive a copy of the TILA disclosures or the RISC in a form that they could keep until several weeks after signing the RISC. Plaintiffs claim that Defendant has treated others similarly and seeks certification of a class. In particular, Plaintiffs propose the following class definition:

> All consumers who executed a retail installment sales contract in connection with the purchase and finance of a motor vehicle through Sunny Chevrolet Inc., where Sunny Chevrolet Inc. was identified on the face of the contract as the entity to whom the debt arising from the contract is or was initially payable, but who were not given a copy of the contract to keep prior to consummation of the transaction.

(Pl.'s Mot. at 1). To further limit the class, Plaintiffs suggest that it include only consumers "whose retail installment sales contracts were executed during the one-year period immediately preceding the date of filing of plaintiffs' initial complaint on February 14, 2001." (Pl.'s Mot. at 2). Plaintiffs [*3] contend that this class definition includes hundreds of customers.

II.

A. Class Definition

Although not an explicit requirement of Rule 23, "a [class] definition that is precise, objective, and presently ascertainable" is necessary. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 30.14 (3d ed. 1995). The MANUAL FOR COMPLEX LITIGATION specifically notes that "definitions ... should avoid criteria that are subjective ... or that depend on the merits." *Id.* Plaintiffs' proposed definition emphasizing that it includes only consumers "who were not given a copy of the contract to keep prior to consummation of the transaction" depends on the merits. In particular, it is identical to the language in the TILA regulation which Defendant allegedly violated. *See* 12 C.F.R. § 226.17(a)(1) ("the creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep."); 12 C.F.R. § 226.17(b) ("the creditor shall make disclosures before consummation of the transaction."). In other words, the definition is a repetition of the law. Consequently, the proposed class [*4] definition is inappropriate.

B. TILA Violation

Although it is not necessary that a class must prevail, it is helpful to consider the merits of the proposed class' claim. Although the facts supporting Plaintiffs' claims have not been fully developed, it appears that Defendant has a policy of giving customers a copy of the RISC, which includes the TILA disclosures, after the customer has signed the RISC. Plaintiffs contend that under these facts, Defendant has violated TILA.

Pursuant to Regulation Z, which is the Federal Reserve Board's interpretation of TILA, "the creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. § 226.17(a)(1). Additionally, "the creditor shall make disclosures before consummation of the transaction." 12 C.F.R. § 226.17(b). The Fourth Circuit has found that the plain meaning of the regulation must be understood to be that written disclosure in the form specified in subpart (a) must be provided to the consumer at the time specified in subpart (b). That is, Crown Auto was required to make the disclosures [*5] to Polk in writing, in a form that he could keep, before consummation of the transaction.

Polk v. Crown Auto, Inc., 221 F.3d 691, 692 (4th Cir. 2000). While several district courts have followed *Polk*, *see e.g.*, *Walters v. First State Bank*, 134 F. Supp. 2d 778, 781-82 (W.D. Va. 2001) (applying *Polk* and adopting *Lozada* court's analysis); *Brugger v. Elmhurst*

Kia, No. 01 C 1860, 2001 U.S. Dist. LEXIS 10298, *3 (N.D. Ill. July 18, 2001) (citing *Polk); Lozada v. Dale Baker Oldsmobile, Inc.*, 197 F.R.D. 321, 337 (W.D. Mich. 2000) (following *Polk* and collecting cases), a few district court have limited the decision and declined to follow the broad implications of *Polk* that Plaintiffs seek here. *See e.g., Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 535, 539 (E.D. Va. 2001); *Vang v. Morrie's Minnetonka Ford*, No. 01-82 (DWF/AJB), 2001 U.S. Dist. LEXIS 20689 (D. Minn. Dec. 11, 2001) (following *Diaz's* approach and citing *Nigh); Spearman v. Tom Wood Pontiac-GMC, Inc.*, No. IP 00-1340-C-T/G, 2001 U.S. Dist. LEXIS 22225 (S.D. Ind. Dec. 3, 2001) [*6] (overruling *Spearman v. Tom Wood Pontiac-GMC, Inc.*, No. IP 00-1340-C-T/G, 2001 U.S. Dist. LEXIS 13114 (S.D. Ind. July 30, 2001)); *Diaz v. Joe Rizza Ford, Inc.*, No. 00-C-7082, 210 F. Supp. 2d 959, 2001 U.S. Dist. LEXIS 18198 (N.D. Ill. Nov. 2, 2001); *Tripp v. Charlie Falk Auto*, No. 3:00CV512, 2001 U.S. Dist. LEXIS 14096 (E.D. Va. Aug. 22, 2001) (citing *Nigh*)).

After careful review of the available facts, it appears that *Polk* is factually distinguishable. The defendant in *Polk* "conceded that it did not make disclosures to Polk in writing, in a form that he could keep, before consummation." In other words, the defendant dealership did not argue that giving the customer the RISC, which contained the TILA disclosures in writing, before the customer signed it satisfied TILA. Here, Defendant is expressly making this argument. Thus, the *Polk* Court did not address the issue in this case.

Because the facts have not been fully developed, the Court cannot determine whether a violation has occurred. Without deciding the issue and noting that *Polk* does not address the issue in this case, the Court finds the analysis in *Diaz* [*7] *v. Joe Rizza Ford, Inc.*, 210 F. Supp. 2d 959, 2001 U.S. Dist. LEXIS 18198 (N.D. Ill. Nov. 2, 2001), persuasive. While acknowledging the *Polk* decision and the purposes of TILA, the *Diaz* court found no violation of TILA on the specific facts. These key facts are:

> Defendant uses a three-copy form. The top form is filled out after the terms have been negotiated, and the customer, after an opportunity to review it, signs the top form -- the imprint of her signature appearing also on the second and third pages. The top copy is then separated from the other two copies and given to the customer, generally immediately, but in all events before the customer leaves the premises.

Id. at *2. *See also Vang v. Morrie's Minnetonka Ford*, No. 01-82 (DWF/AJB), 2001 U.S. Dist. LEXIS 20689, *8-*11 (D. Minn. Dec. 11, 2001) (adopting the *Diaz* court's analysis and noting that TILA does not create a waiting period); *Spearman v. Tom Wood Pontiac-GMC, Inc.*, No. IP 00-1340-C-T/G, 2001 U.S. Dist. LEXIS 22225, *16-*19 (S.D. Ind. Dec. 3, 2001) (following the *Diaz* court's analysis). Thus, the parties will need more [*8] factual development before this Court can

determine whether Defendant has complied with TILA.

C. Class Certification

"Under governing law, a court may certify a class if it performs 'rigorous analysis' of the requirements of Federal Rule of Civil Procedure 23." *Stout v. J.D. Byrider*, 228 F.3d 709, 716 (6th Cir. 2000) (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982)). Rule 23 requires a multiple step analysis. First, the proposed class must satisfy the four "prerequisites to a class action" of Rule 23(a). Second, the proposed class must be "maintainable" pursuant to either Rule 23(b)(1), 23(b)(2), or 23(b)(3). Plaintiffs claim that the proposed class in this case is maintainable as a class under either Rule 23(b)(3) or 23(b)(2).

The Court begins by analyzing whether Plaintiffs have satisfied the prerequisites to class certification in Rule 23(a). Describing the prerequisites to class certification, the Sixth Circuit has stated that:

> Rule 23(a) sets forth four prerequisites to class certification: (1) the class must be so numerous that "joinder of all members is impracticable; [*9] " (2) there must be "questions of law or fact common to the class;" (3) the claims of the representative party must be "typical" of the class; and (4) the representative party must be able to

"fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

Stout v. J.D. Byrider, 228 F.3d 709, 716-17 (6th Cir. 2000).

Without analyzing all the other requirements, Plaintiffs have not demonstrated that their claims are typical of the class. "Typicality 'determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.'" *Stout,* 228 F.3d at 717 (quoting *Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 399 (6th Cir. 1998)). Plaintiffs did not receive their RISCs for several weeks, but the facts suggest that other class members received their RISCs immediately after they signed. (Pl.'s Br. Supp. of Class Certification Ex. A at 42 ("A. They're supposed to get copies of their contract. Q. At what stage of the transaction? A. As soon [*10] as they sign it.")) In other words, the facts in Plaintiffs' case are significantly more egregious than the proposed class. Joinder of Plaintiffs claims with the class may serve to dilute Plaintiffs' claims. Alternatively, it may strengthen the claims of other class members. Because of this important difference between Plaintiffs' claims and the claims of the proposed class members, Plaintiffs are not typical of the class. n1 As the Court declines to certify a class in this case, it is not necessary to address either the other requirements of Rule 23(a) or of Rule 23(b).

n1 In *Daenzer v. Wayland Ford, Inc.*, the court certified a class despite the defendant's objections that the plaintiff had not shown typicality. The court's reasoning was that "Defendant cannot defeat typicality with unproven assertions." *Daenzer v. Wayland Ford, Inc.*, 2002 U.S. Dist. LEXIS 1296, No. 1:01-CV-133, slip op. at 4 (W.D. Mich. Jan. 23, 2002) (Enslen, J.). Here, there is deposition testimony supporting the fact that Plaintiffs are not typical of the proposed class, and hence, the objection as to typicality is not a mere unproven assertion. [*11]

III.

In summary, Plaintiffs' proposed class definition is inadequate because it defines the class in terms of a legal conclusion. Additionally, Plaintiffs are not typical of their proposed class. Therefore, Plaintiffs' motion for class certification is DENIED.
Date: July 5, 2002

ROBERT HOLMES BELL

CHIEF UNITED STATES DISTRICT JUDGE

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiffs' motion for class certification is **DENIED.**

Date: July 5, 2002

ROBERT HOLMES BELL

CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

WANDA BAKER and SCOTT ZALEWSKI,
Plaintiffs,
v.
SUNNY CHEVROLET INC.,
a Michigan corporation,
d/b/a WAYLAND CHEVROLET,
Defendant.

File No. 1:01-CV-109

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

2002 U.S. Dist. LEXIS 4139

March 7, 2002, Decided
March 8, 2002, Filed

SUBSEQUENT HISTORY:
Class certification denied by Baker v. Sunny Chevrolet, Inc., 2002 U.S. Dist. LEXIS 26947 (W.D. Mich., July 5, 2002)

DISPOSITION: [*1] Plaintiffs' motion for summary judgment DENIED. Defendant's motion for summary judgment GRANTED. JUDGMENT entered in favor of Defendant and Plaintiffs' complaint DISMISSED in its entirety.

JUDGES: ROBERT HOLMES BELL, CHIEF UNITED STATES DISTRICT JUDGE.

OPINIONBY: ROBERT HOLMES BELL

OPINION:

Before this Court are cross motions for summary judgment. Plaintiffs are seeking statutory damages for Defendant's violations of the Truth in Lending Act ("TILA"). Specifically, Plaintiffs claim that by failing to provide them with copies of disclosures, Defendant has violated 15 U.S.C. §§ 1638(a)(3)-(a)(6), 1638(a)(9), 1638(b)(1). Defendant's motion argues that statutory damages are not permitted for a violation of § 1638(b)(1).

As explained, Plaintiffs' motion [*2] for summary judgment is DENIED, and Defendant's motion for summary judgment is GRANTED.

I.

On December 28, 2000, Plaintiff Baker signed a retail installment sales contract to purchase a car. Although Plaintiff Baker asked for a copy of the contract, Defendant refused to give Plaintiff Baker a copy of the contract at that time. A couple of weeks later, on January 11, 2001, Defendant requested that Plaintiff Baker and Plaintiff Zalewski return to sign some additional paperwork. At the dealership, Plaintiffs were informed that Plaintiff Baker would have to sign a second contract and that Plaintiff

Zalewski would also have to sign the second contract. Again, both Plaintiffs asked Defendant for a copy of the signed contract, and Defendant still refused to provide them with a copy of either contract. Plaintiffs finally received a copy of the second contract several weeks later around January 29, 2001. Plaintiff Baker has never received a copy of the first contract that she signed.

II.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any [*3] material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). An issue concerning a material fact is genuine if the record as a whole could lead a reasonable trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Under Rule 56, the court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248. Summary judgment is proper if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to the party's case for which that

party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

III.

A. Statutory Damages and Violations of 15 U.S.C. § 1638(b)(1)

Using Defendant's assumption that § 1638(b)(1) [*4] was violated, whether statutory damages are available for this violation is a question of statutory interpretation. To determine the meaning of a statute, the Court reviews the "'the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *Walker v. Bain*, 257 F.3d 660, 666-67 (6th Cir. 2001) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 100 L. Ed. 2d 313, 108 S. Ct. 1811 (1988)). While the literal language of the statute is important, it may not "lead to absurd results or an interpretation which is inconsistent with the intent of Congress." *Id.* 257 F.3d at 667.

The key statutory language reads:

> *Except as otherwise provided in this section*, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--. . .

> (2)(A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction,
>
> . . .
>
> *In connection with the disclosures referred* [*5] *to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title,* or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title.

15 U.S.C. § 1640(a) (emphasis added).

In *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000), the Seventh Circuit determined that statutory damages were not available for violations of 15 U.S.C. § § 1632(a), 1638(a)(8), 1638(b)(1). *Id.* 202 F.3d at 990-91. The Seventh Circuit found that:

> Statutory damages are available, this final sentence says, "*only* for failing to comply with the requirements of section 1635 of

> this title or of paragraph (2) (insofar as it requires a disclosure [*6] of the 'amount financed'), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for" other situations not presented by these cases. "Only," the word we have italicized, is conclusive against plaintiffs, for it confines statutory damages to a closed list. Failure to emphasize the typeface of "finance charge" and "annual percentage rate" violates § 1632(a); omission of descriptive explanations violates § 1638(a)(8); appearance of extra matter in the federal box violates § 1638(b)(1). None of these subsections is on the list of violations eligible for statutory damages.

Brown 202 F.3d at 991. A number of district courts outside the Seventh Circuit have followed the *Brown* decision. *See Turk v. Chase Manhattan Bank USA, NA*, 2001 U.S. Dist. LEXIS 8862, No. 00 CIV1573CMGAY, 2001 WL 736814, at *2 (S.D.N.Y. June 11, 2001) (citing *Brown* and noting "because a violation of § 1632 does not entitle plaintiffs to statutory damages under § 1640, and because plaintiffs have not alleged actual damages, they cannot state a claim."); *Molenbeek v. West Mich. Auto & Truck Outlet, Inc.*, 2001 U.S. Dist. LEXIS 3433, No. 1:00- CV-286, 2001 WL 1602654, at *5 (W.D. Mich. Mar. 15, 2001) (Miles, J. [*7]) (citing *Brown* and denying statutory damages for a week long delay in providing a copy of TILA disclosures). *See also Peter v. Vill. Imports Co.*, 2001 U.S. Dist. LEXIS 24365, No. 01-12 DSD/JMM, 2001 WL 1640130, at *3

(D. Minn. Oct. 9, 2001) ("Defendant's alleged failure to provide timely disclosures is a purported violation of 15 U.S.C. 1638(b) for which only actual damages are available."); *Tripp v. Charlie Falk Auto*, 2001 U.S. Dist. LEXIS 14096, No. CIV 3:00 CV512, 2001 WL 1105132, at *6 (E.D. Va. Aug. 22, 2001) ("Thus, where a dealer has violated the pre-consummation timing requirement only actual damages are available."); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 535, 549 (E.D. Va. 2001) ("Koons' alleged failure to provide timely disclosures falls within the purview of 15 U.S.C. § 1638(b), for which only actual damages are available.").

The language relied on by the Seventh Circuit in *Brown* was added to TILA in 1980. *Brown*, 202 F.3d at 991. *See also* Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, § 615(b)(2), 94 Stat. 168, 181 (1980). The legislative history supporting this addition [*8] states that "this bill would narrow a creditor's civil liability for statutory penalties to only those disclosures which are of central importance in understanding a credit transaction's cost or terms. It is anticipated that this will eliminate litigation which is based on violations of a purely technical nature." S. REP. NO. 96-73, at 7 (1980), *reprinted in* 1980 U.S.C.C.A.N. 280, 285. Additionally, "this section is intended to restrict the scope of creditor civil liability for statutory penalties to only those disclosures which are of material importance in credit shopping." S. REP. NO. 96-73, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 280, 294.

This Court agrees with the Seventh Circuit and finds that consistent with the plain meaning of the statute, statutory damages are not available for a violation of § 1638(b). This plain meaning is supported by the legislative history, which indicates that Congress intended to limit the scope of creditor liability. Consequently, Plaintiffs are not entitled to statutory damages for a violation of 15 U.S.C. § 1638(b).

B. Violations of 15 U.S.C. §§1638(a)(3)-(a)(6), 1638(a)(9)

Next, [*9] Plaintiffs contend that even if they are not entitled to statutory damages for a violation of § 1638(b), statutory damages are permitted for violations of §1638(a)(3)-(a)(6) and § 1638(a)(9). These sections require disclosure of the finance charge (§1638(a)(3)), the annual percentage rate (§1638(a)(4)), the total of payments (§1638(a)(5)), the timing and amount of periodic payments (§1638(a)(6)), and the existence of a security interest (§1638(a)(9)). Plaintiffs claim that a failure to provide them with a copy of these disclosures constitutes a complete failure to disclose and that consequently, Defendant has violated 15 U.S.C. §§1638(a)(3)-(a)(6), 1638(a)(9), which entitles Plaintiffs to statutory damages.

The Seventh Circuit in *Brown* rejected Plaintiff's argument. In particular, the Seventh Circuit noted:

> Yet accepting this argument would destroy the point of § 1640(a). What sense would it make to omit §1632, § 1638(a)(1),

> (a)(2) (in part), (a)(7), (a)(8), (a)(10), (a)(11), (a)(12), and all of § 1638(b), (c), and (d) from the candidates for statutory damages if they came in through the back door on the theory that all formal [*10] shortcomings infect the disclosures of the items that are on the list? Congress included some and excluded others; plaintiffs want us to turn this into universal inclusion, which would rewrite rather than interpret § 1640(a).

Brown, 202 F.3d at 991.

In this case, Plaintiffs have not alleged that any of the disclosures were incorrect. Instead, Plaintiffs are claiming that only permitting them to review the information before signing and not providing them with a copy afterwards is not a disclosure. Although Defendant's action in not providing Plaintiffs with a copy of their contracts at signing seems inappropriate, the *Brown* court's reasoning is persuasive, and on these facts, Defendant is not liable for violations of 15 U.S.C. § §1638(a)(3)-(a)(6), 1638(a)(9).

IV.

In conclusion, neither the plain meaning of 15 U.S.C. §1640(a) nor the legislative history of this provision supports statutory damages for a violation of 15 U.S.C. §1638(b). Additionally, Plaintiffs' argument that a failure to comply with 15 U.S.C. § 1638(b) constitutes a failure to disclose under [*11] 15 U.S.C. §§1638(a)(3)-(a)(6), 1638(a) (9) is not persuasive because as the Seventh Circuit noted, this argument

essentially rewrites the statutory damages provision. Hence, Plaintiffs' motion for summary judgment is DENIED, and Defendant's motion for summary judgment is GRANTED. Accordingly, an order and judgment consistent with this opinion will be entered.
Date: March 7, 2002

ROBERT HOLMES BELL

CHIEF UNITED STATES DISTRICT JUDGE

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiffs Wanda Baker and Scott Zalewski's motion for summary judgment (Docket # 66) is **DENIED.**

IT IS FURTHER ORDERED that Defendant Sunny Chevrolet Inc.'s motion for summary judgment (Docket # 67) is **GRANTED.**

IT IS FURTHER ORDERED that **JUDGMENT** is entered in favor of Defendant and Plaintiffs' complaint is **DISMISSED** in its entirety.
Date: March 7, 2002

ROBERT HOLMES BELL

CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

WANDA BAKER, ET AL.,
Plaintiffs-Appellants,
v.
SUNNY CHEVROLET, INC.,
a Michigan Corporation doing business as
WAYLAND CHEVROLET,
Defendant-Appellee.

No. 02-1381

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
2003 U.S. App. LEXIS 26619

December 29, 2003, Filed

PRIOR HISTORY: Baker v. Sunny Chevrolet, Inc., 349 F.3d 862, 2003 U.S. App. LEXIS 22630 (6th Cir.) (6th Cir. Mich., 2003)

DISPOSITION: Petition for rehearing, and rehearing en banc, denied.

JUDGES: BEFORE: KENNEDY, GUY, and DAUGHTREY, Circuit Judges.

OPINION:

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all

other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX E

15 USC §1601(a)

§1601. Congressional findings and declaration of purpose.

(a) Informed use of credit. The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title [15 USC §§1601 et seq.] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

APPENDIX F

15 USC §1638(a) and (b)

§1638. Transactions other than under an open end credit plan

(a) Required disclosures by creditor. For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

(1) The identity of the creditor required to make disclosure.

(2) (A) The "amount financed", using that term, which shall be the amount of credit of which the consumer has actual use. This amount shall be computed as follows, but the computations need not be disclosed and shall not be disclosed with the disclosures conspicuously segregated in accordance with subsection (b)(1):

(i) take the principal amount of the loan or the cash price less downpayment and trade-in;

(ii) add any charges which are not part of the finance charge or of the principal amount of the loan and which are financed by the consumer, including the cost of any items excluded from the finance charge pursuant to section 106 [15 USC § 1605]; and

(iii) subtract any charges which are part of the finance charge but which will be paid by the consumer before or at the time of the consummation of the transaction, or have been withheld from the proceeds of the credit.

(B) In conjunction with the disclosure of the amount financed, a creditor shall provide a statement of the consumer's right to obtain, upon a written request, a written itemization of the amount financed. The statement shall include spaces for a "yes" and "no" indication to be initialed by the consumer to indicate whether the consumer wants a written itemization of the amount financed. Upon receiving an affirmative indication, the creditor shall provide, at the time other disclosures are required to be furnished, a written itemization of the amount financed. For the purposes of this subparagraph, "itemization of the amount financed" means a disclosure of the following items, to the extent applicable:

(i) the amount that is or will be paid directly to the consumer;

(ii) the amount that is or will be credited to the consumer's account to discharge obligations owed to the creditor;

(iii) each amount that is or will be paid to third persons by the creditor on the consumer's behalf, together with an identification of or reference to the third person; and

(iv) the total amount of any charges described in the preceding subparagraph (A)(iii).

(3) The "finance charge," not itemized, using that term.

(4) The finance charge expressed as an "annual percentage rate", using that term. This shall not be required if the amount financed does not exceed $ 75 and the finance charge does not exceed $ 5, or if the

amount financed exceeds $ 75 and the finance charge does not exceed $ 7.50.

(5) The sum of the amount financed and the finance charge, which shall be termed the "total of payments".

(6) The number, amount, and due dates or period of payments scheduled to repay the total of payments.

(7) In a sale of property or services in which the seller is the creditor required to disclose pursuant to section 121(b) [15 USC §1631(b)], the "total sale price", using that term, which shall be the total of the cash price of the property or services, additional charges, and the finance charge.

(8) Descriptive explanations of the terms "amount financed", "finance charge", "annual percentage rate", "total of payments", and "total sale price" as specified by the Board. The descriptive explanation of "total sale price" shall include reference to the amount of the downpayment.

(9) Where the credit is secured, a statement that a security interest has been taken in (A) the property which is purchased as part of the credit transaction, or (B) property not purchased as part of the credit transaction identified by item or type.

(10) Any dollar charge or percentage amount which may be imposed by a creditor solely on account of a late payment, other than a deferral or extension charge.

(11) A statement indicating whether or not the consumer is entitled to a rebate of any finance charge upon refinancing or prepayment in full pursuant to acceleration or otherwise, if the obligation involves a precomputed finance charge. A statement indicating whether or not a penalty will be imposed in those

same circumstances if the obligation involves a finance charge computed from time to time by application of a rate to the unpaid principal balance.

(12) A statement that the consumer should refer to the appropriate contract document for any information such document provides about nonpayment, default, the right to accelerate the maturity of the debt, and prepayment rebates and penalties.

(13) In any residential mortgage transaction, a statement indicating whether a subsequent purchaser or assignee of the consumer may assume the debt obligation on its original terms and conditions.

(14) In the case of any variable interest rate residential mortgage transaction, in disclosures provided at application as prescribed by the Board for a variable rate transaction secured by the consumer's principal dwelling, at the option of the creditor, a statement that the periodic payments may increase or decrease substantially, and the maximum interest rate and payment for a $ 10,000 loan originated at a recent interest rate, as determined by the Board, assuming the maximum periodic increases in rates and payments under the program, or a historical example illustrating the effects of interest rate changes implemented according to the loan program.

(b) Form and timing of disclosures; residential mortgage transaction requirements.

(1) Except as otherwise provided in this chapter [15 USC §§1631 et seq.], the disclosures required under subsection (a) shall be made before the credit is extended. Except for the disclosures required by subsection (a)(1) of this section, all disclosures

required under subsection (a) and any disclosure provided for in subsection (b), (c), or (d) of section 106 [15 USC §1605] shall be conspicuously segregated from all other terms, data, or information provided in connection with a transaction, including any computations or itemization.

(2) In the case of a residential mortgage transaction, as defined in section 103(w) [15 USC §1602(w)], which is also subject to the Real Estate Settlement Procedures Act, good faith estimates of the disclosures required under subsection (a) shall be made in accordance with regulations of the Board under section 121(c) [15 USC §1631(c)] before the credit is extended, or shall be delivered or placed in the mail not later than three business days after the creditor receives the consumer's written application, whichever is earlier. If the disclosure statement furnished within three days of the written application contains an annual percentage rate which is subsequently rendered inaccurate within the meaning of section 107(c) [15 USC §1606(c)], the creditor shall furnish another statement at the time of settlement or consummation.

APPENDIX G

Reg Z 12 CFR §226.16

§226.17. General disclosure requirements.

(b) Time of disclosures. The creditor shall make disclosures before consummation of the transaction. In certain residential mortgage transactions, special timing requirements are set forth in §226.19(a). In certain variable-rate transactions, special timing requirements for variable-rate disclosures are set forth in §226.19(b) and §226.20(c). In certain transactions involving mail or telephone orders or a series of sales, the timing of disclosures may be delayed in accordance with paragraphs (g) and (h) of this section.

APPENDIX H

15 USC §1640

§1640. Civil liability

(a) Individual or class action for damages; amount of award; factors determining amount of award. Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter [15 USC §§1631 et seq.], including any requirement under section 125 [15 USC §1635], or chapter 4 or 5 of this title [15 USC §§1666 et seq. or 1667 et seq.] with respect to any person is liable to such person in an amount equal to the sum of--

(1) any actual damage sustained by such person as a result of the failure;

(2) (A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title [15 USC §§1667 et seq.], 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $ 200 or greater than $ 2,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any

class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $ 500,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 125 [15 USC §1635], the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 129 [15 USC §1639], an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 127 [15 USCS § 1637(a) and (b)], a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 125 [15 USCS § 1635], section 127(a) [15 USCS § 1637(a)], or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 127(b) [15 USCS § 1637(b)(4), (5), (6), (7), (8), (9), or (10)] or for failing to comply with disclosure requirements under State law for any term

or item which the Board has determined to be substantially the same in meaning under section 111(a)(2) [15 USCS § 1610(a)(2)] as any of the terms or items referred to in section 127(a) [15 USCS § 1637(a)] or any of those paragraphs of section 127(b) [15 USCS § 1637(b)(4), (5), (6), (7), (8), (9), or (10)]. In connection with the disclosures referred to in subsection (c) or (d) of section 127 [15 USCS § 1637(c) or (d)], a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 127(c)(1)(A)(ii)(I) or section 127(c)(4)(A)(i) [15 USC §1637(c)(1)(A)(ii)(I) or (c)(4)(A)(i)] or who uses the credit card or charge card. In connection with the disclosures referred to in section 128 [15 USC §1638], a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 125 [15 USC §1635] or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 128(a) [15 USC §1638(a)], or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 111(a)(2) [15 USC §1610(a)(2)] as any of the terms referred to in any of those paragraphs of section 128(a) [15 USC §1638(a)]. With respect to any failure to make disclosures required under this chapter [15 USC §§1631 et seq.] or chapter 4 or 5 of this title [15 USC §§1666 et seq. or 1667 et seq.], liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 131 [15 USC §1641].

(b) Correction of errors. A creditor or assignee has no liability under this section or section 108 or section

112 [15 USC §1607 or 1611] for any failure to comply with any requirement imposed under this chapter or chapter 5 [15 USC §§1631 et seq. or 1667 et seq.], if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 108(e)(1) [15 USC §1607(e)(1)] or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(c) Unintentional violations; bona fide errors. A creditor or assignee may not be held liable in any action brought under this section or section 125 [15 USC §1635] for a violation of this title [15 USC §§1601 et seq.] if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this title [15 USC §§1601 et seq.] is not a bona fide error.